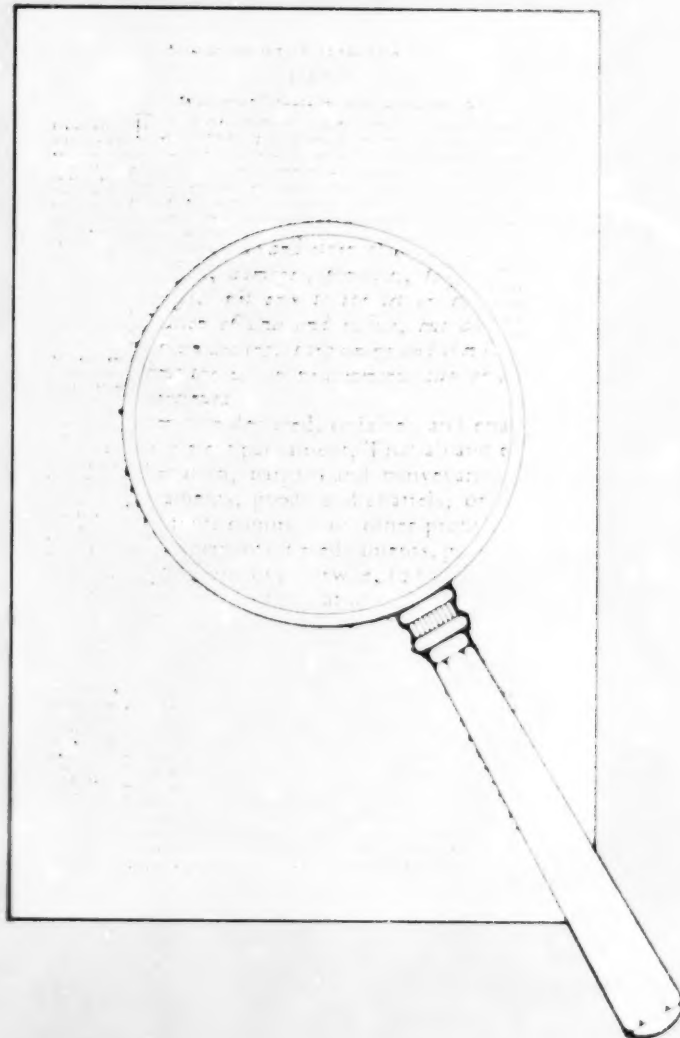




Law Reform
Commission

Yearly Review 1983

Saskatchewan



YEARLY REVIEW 1983

**Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan**

March, 1984

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

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LL.M., S.J.D., Chairman

Miss MARJORIE A. GERWING, Q.C., B.A., LL.B.

Mr. GORDON J. KUSKI, Q.C., LL.B.

Mr. Kenneth P. R. Hodges, B.A., LL.B. is the Director of Research.

Mr. Michael J. W. Finley, B.A., M.A., LL.B., and Mr. C. Peter Thagard, LL.B. are the Legal Research Officers, and Mr. Roderick J. Wood, LL.B., LL.M., Dip. in Legislative Drafting and Mrs. Sandy Antonini-Ready, B.A., LL.B. are Legal Research Officers under contract. The secretaries are Mrs. Sandra Ritchie and Miss Pat Harasymchuk.

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OBJECTIVES OF THE COMMISSION

The Law Reform Commission Act provides that:

"The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law, and for that purpose shall:

- (a) receive and consider any proposals for the reform of the law that may be made to it by the Minister of Justice;
- (b) prepare and submit to the Minister of Justice from time to time programs for the examination of different branches of the law with a view to their reform and shall recommend that an agency, whether the commission or a committee thereof or other body, carry out the examination;
- (c) undertake, at the request of the Minister of Justice or pursuant to recommendations of the commission approved by the Minister of Justice, the examination of particular branches of the law and the formulation, by means of draft bills or otherwise, of proposals for reform therein;
- (d) enter into agreements, with the approval of the Minister of Justice, with other organizations for law reform for the purposes of attaining the aims of the commission." R.S.S. 1978, c. L-8, s. 6 as amended.

The Commission's role is to review provincial law and to assess criticisms of a significant nature from the general public against legislation and rules of the common law.

Topics for the Commission's research program are brought before meetings of the Commission for consideration. These topics may originate from a recommendation by the Minister of Justice, from the Commission and its staff, from the judiciary, from the legal profession, from other professional organizations, or from the public generally. If a proposal for law reform originates from sources other than the recommendation of the Minister of Justice, the Commission considers the proposal and, if it feels the proposal is one which requires research and report to the Minister of Justice, it will propose to the Minister of Justice that such research be undertaken. Once the consent of the Minister of Justice is obtained, a research program is instituted which culminates in a report to the Minister of Justice.

All research undertaken is supervised by the Chairman and Director of Research. Much of the research is done by the Commission's full-time staff. Many projects, however, require substantial outside consultation and expertise.

Consequently, the Commission relies on the academic staff of the College of Law of the University of Saskatchewan and elsewhere for research personnel. Legal practitioners also act as consultants from time to time and give to the Commission a practical assessment of possible recommendations for legislative and procedural change. The participation of practising lawyers is being facilitated through financial assistance provided by the Law Foundation of Saskatchewan.

Once the research study in a particular project is completed, the matter is placed before the Commission for discussion and consideration. The Commission may decide to issue background papers, or more likely papers in the form of tentative proposals, for circulation to the public in order to obtain criticism and comment prior to the preparation of a final report. This may entail public meetings, hearings and workshops. After public comment has been assessed, the Commission's recommendations are embodied in a final report to the Minister of Justice. This report may contain general recommendations, specific legislation or drafting instructions suggesting the form of legislation which will best implement the recommendations of the final report.

DESCRIPTION OF THE PROGRAMS AND ACTIVITIES CARRIED OUT DURING 1983

The programs and activities carried out during 1983 to a large extent are a continuation of projects commenced earlier. Some of the projects are extensive in scope and involve research in a number of areas of law.

1. Family Law Project

The Commission, with the consent of the Minister of Justice, initiated a research project on family law in June of 1974.

In 1974 the Commission issued a background paper entitled "Family Maintenance Between Husband and Wife". Shortly thereafter a background paper entitled "Children's Maintenance" was released.

Two papers were completed in 1979: (1) "Tentative Proposals for Custody Law Reform, Part I: Substantive Law", and (2) "Tentative Proposals Relating to the Civil Rights of Children". A third paper entitled "Tentative Proposals for Custody Law Reform, Part II: Procedures and Support Services" was released in 1980. Based on these Tentative Proposals, a final report entitled "Proposals on Custody, Parental Guardianship and the Civil Rights of Minors" was issued in December, 1981.

In the area of married persons' property, a report entitled "Tentative Proposals for an Equality of Status of Married Persons Act" was issued in May, 1981 and a final report was released in May, 1982.

Research in the area of maintenance procedures was completed and a report dealing with maintenance enforcement was released in March, 1982.

A draft paper on illegitimacy was completed some time ago. This paper has not however been approved by the Commission.

The Commission has been reviewing *The Matrimonial Property Act* which came into force on January 1, 1980, along with the relationship of that Act and *The Homesteads Act* as well as *The Dependants' Relief Act* and *The Intestate Succession Act*. A report by way of tentative proposals will be released in 1984.

2. Consumer Credit Project

The study of consumer credit law in Saskatchewan and proposals for reform of it is a part of the overall study of personal property security law in Saskatchewan. The Commission decided that proposals for the reform of basic chattel security law should be developed first, since the structure and terminology of a totally reformed personal property security law system would necessarily be part of the reform of consumer credit law.

Pursuant to this approach, a final report entitled "Proposals for a Saskatchewan Personal Property Security Act" was issued in July, 1977. *The Personal Property Security Act* which stems from the proposals was enacted by the Legislature in 1980 and came into force on May 1, 1981.

The Consumer Credit Project is well underway and the following paper was released in 1980: "Tentative Proposals for a Consumer Credit Act, Part I: Background and Underlying Considerations, Part II: Statistics". A second paper entitled "Tentative Proposals for a Consumer Credit Act, Part III: Secured Consumer Credit Transactions, Summary of Recommendations" was issued in May, 1981. Further research is presently being considered for the following areas:

- Credit Grantor Responsibility for Defects in Merchants' Performance Obligations;
- Extra-Judicial Debt Collection Practices;
- Credit Insurance;
- Enforcement of Credit Consumer Rights;
- Disclosure;
- Credit Reporting;
- Discrimination in Credit Granting;
- Consumer Education.

As the study progresses, it may be necessary to add to this list or consolidate two or more items into a single paper.

Professor Ronald C. C. Cuming, Q.C., College of Law, University of Saskatchewan is in charge of this project and has been continuing work thereon.

3. Provincial Offences Project

A study of the doctrine of strict liability has been completed and a report entitled "Tentative Proposals for Defences to Provincial Offences" was released early in 1981. Formulation of the final report has been postponed pending continuing consultation with the Alberta Institute of Law Research and Reform.

4. Medical-Legal Project

A report dealing with the legal status of the dependent adult, entitled "Tentative Proposals for a Guardianship Act, Part I: Personal Guardianship" was released in January, 1981. There has been a considerable amount of response from the general public and in particular, interest has been shown in the report by the Saskatchewan Association for the Mentally Retarded. The final report was released in January, 1983.

"Tentative Proposals for a Human Artificial Insemination Act" was released in November, 1981. There have been a number of meetings of interested groups to discuss the Tentative Proposals including a meeting with representatives of the Saskatchewan Medical Association and the College of Physicians and Surgeons.

Following a study of the law governing civil commitment, "Tentative Proposals for a Compulsory Mental Health Care Act" was released late in 1981. Meetings with representatives of the Saskatchewan Medical Association and the College of Physicians and Surgeons took place in 1983. In addition the Commission was represented at hearings conducted by a Committee of Enquiry of the Canadian Mental Health Association throughout the province during 1983. It is expected that a final report will be issued in 1984.

"Tentative Proposals for a Lieutenant Governor's Review Board in Saskatchewan" was released early in 1984. These proposals were based on a report by Professor Peter MacKinnon, College of Law, University of Saskatchewan.

5. Administrative Law Project

Preliminary research was done on this project during the summer of 1978 on (a) Statutory Powers of Decision in the Licensing/Inspection Category of the Statutes of Saskatchewan, and (b) A Review of Benefit/Compensation Statutes.

During 1980-81, a consultant worked in the areas of administrative procedures and remedies. The project is at present in abeyance until another consultant is engaged.

6. The English Statutes Project

This project involves consideration of the statute laws of England which are in force in this province. Too often lawyers are faced with the problem of determining whether or not an ancient English statute is or is not law in Saskatchewan. The British have been pruning and tidying their statutes for almost a century and in the interests of greater certainty, it is time for the common law provinces, including Saskatchewan, to put their own houses in order. Work on this project is being continued by the Commission staff.

7. The Limitation of Actions Act Project

This project involves major policy issues including mandatory notices of claims within specific periods of time, commencing actions within specific periods of time and the categorization of various actions to determine the appropriate limitation period.

Much preliminary research was completed by a student in the summer of 1979. A list of the limitation periods to be found in the Statutes of Saskatchewan prepared for this project was published in the *Saskatchewan Law Review* Vol. 45, No. 1, p. 103 and this has been of assistance to practising members of the bar.

A short report entitled "Tentative Proposals for Changes in Limitations Legislation, Part I: The Effect of Limitations on Title to Real Property" was released in July, 1981. Further work on this project is being continued by the Commission's consultant.

8. Frustrated Contracts Project

Saskatchewan is one of the few provinces that does not have legislation which regulates the rights of parties in cases where a frustrating event prevents or substantially affects performance of a contract. The common law rules dealing with frustration are generally unpredictable and unfair.

The Commission decided in 1979 to undertake a study of this area of law. The project consists of the following parts:

- (a) An analysis of the present common law of Saskatchewan applicable to frustration of contracts. This part will illustrate and discuss all the problems which have been covered by the frustrated contracts legislation.
- (b) An analysis of the common law and statutory provisions applicable to the frustration of contracts in the United States and the manner in which they deal with the problems which have been subjected to statutory regulation in Commonwealth jurisdictions.

Under heading (a) and (b) two types of issues will be dealt with:

- (i) the circumstances in which the contract is deemed to be frustrated.
- (ii) the legal effects of frustration.
- (c) Reasons for legislation. This part will analyze the desirability of passing an Act regulating the substantive and/or the remedial law of frustration.
- (d) Evaluation of the different statutes enacted elsewhere and their effect on the common law. This part will also contain a summary of recommendations and a proposed statute.

Professor Louis J. Romero, College of Law, University of Saskatchewan has prepared a report for consideration by the Commission

9. Sale of Goods Act Project

Saskatchewan's sale of goods law like that of all other common law provinces in Canada, is based almost entirely on the English *Sale of Goods Act* of 1893. While some areas of sales law have been subject to special legislative measures, the general law of sales has never been revised in Saskatchewan since its enactment. Veneration of nineteenth century English sales law by Canadians has not been shared by the English. Their statute has been amended four times. It would be inaccurate to conclude that existing sales law is totally out of touch with the realities of modern commercial activity. The basic concepts of the 1893 *Act* remain relevant. Judicial development of sales law has been substantial over the years and generally has taken account of fundamental changes in sales practices. However, a strong case can be made for recodification and modernization of Canadian sales law.

In 1979, the Ontario Law Reform Commission released an extensive report on sale of goods law containing recommendations for extensive revision of the Ontario *Sale of Goods Act*. At the August meeting of the Uniform Law Conference held at Saskatoon, Saskatchewan, a motion was passed providing for the convening of a committee to examine the Ontario report and general sales law with a view to developing a Uniform Sale of Goods Act for all provinces in Canada.

In view of the fact that work in the area was to be carried out on a national level with the opportunity for co-operation among law reform agencies, the Commission decided that it should participate in the joint project under the auspices of the Uniform Law Conference.

The Uniform Law Conference Committee met regularly throughout 1980 and early 1981. Professor Cuming represented the Commission at these meetings and proposed substantial amendments to the Ontario Law Reform Commission Draft Act. The Committee reported to the Uniform Law Conference in August of 1981 and its report containing a uniform draft act was accepted.

Professor Ronald C. C. Cuming, Q.C., College of Law, University of Saskatchewan has agreed to continue the work on this project.

10. Products Liability Project

The Saskatchewan *Consumer Products Warranties Act* provides a regime of "strict liability" for consumer products. In other words, the *Act* provides recovery for loss resulting from defects in consumer products even though the supplier is not negligent in placing the product on the market. However, the *Act* does not apply to a situation where the product which has resulted in loss or injury is not a "consumer product" within the meaning of the *Act*.

where the consumer product has been obtained for purposes of resale or for use in a business. For example, if a vehicle or a piece of equipment was purchased for use in business and as a result of a defect in it a person is injured, liability for the defect would have to be established under the law of negligence. Of course, in any action involving the liability, the nature of the proceedings, the burden of proof and the extent of recovery would be different from what it would be if *The Consumer Products Warranties Act* applied. Generally, the injured person would be in a much less advantageous position than would be a person injured as a result of a defect in a consumer product.

The Canadian law of tort has been very slow to accept "strict liability" as a basis for liability in cases of defective products, although in some circumstances our law has moved toward "strict liability" as a basis for liability in cases of defective products, through the use of the doctrine of *res ipsa loquitur*. By contrast, courts in American jurisdictions have rejected negligence and have developed "strict liability" as a basis for compensation of persons injured by defective goods. There is little indication that Canadian courts are yet prepared to follow the American lead.

However, there is a very strong undercurrent of dissatisfaction with existing Canadian law of negligence. Recently, the Ontario Law Reform Commission published a report on products liability which recommended a modified strict liability scheme to be implemented by legislation.

It is the conclusion of the Law Reform Commission of Saskatchewan that the time has come to "rationalize" the law of Saskatchewan so as to ensure that the likelihood of recovery for loss resulting from defective products does not depend upon the almost fortuitous event that the product causing the injury was sold under a transaction to which *The Consumer Products Warranties Act* applies.

A considerable amount of work was done during 1981. Professor Ronald C. C. Cuming, Q.C., College of Law, University of Saskatchewan, has agreed to continue the work on this project.

11. Guest Passenger Legislation

The owners and drivers of motor vehicles are ordinarily liable for injury caused by their negligence in highway traffic accidents. In 1936, however, the Saskatchewan *Vehicles Act* was amended to limit the right of gratuitous passengers to recover damages from the owners and drivers of vehicles in which they were carried to those cases where there was gross negligence or wilful and wanton misconduct on the part of the driver. Law Reform Commissions in a number of provinces have recommended that the ordinary standard of care should apply to claims for bodily injuries by passengers. Professor Ronald Fritz of the College of Law, University of Saskatchewan, prepared a draft paper which was released as a final report to the Minister of Justice early in 1984.

12. Real Property Law

The Commission is planning a major research project on the real property law of Saskatchewan. Its scope and format have yet to be determined. It has been decided that the best way to proceed with the project is to identify a few areas of real property which are a matter of immediate concern. Two areas so identified are:

- (1) the need for a *Quieting of Title Act*;
- (2) foreclosure of mortgages and charges against land and cancellation of agreements for sale (including *The Land Contracts (Actions) Act*).

Some years ago the Commission engaged the services of a consultant who prepared a paper on the need for a *Quieting of Title Act*. The Commission came to the conclusion that with changes in the limitation periods governing titles, there was no need for such an Act. These changes were put forward in the Commission's report entitled, "Tentative Proposals for Changes in Limitations Legislation, Part I: The Effect of Limitations on Title to Real Property", issued as part of its Limitations of Actions Act Project in July, 1981.

A draft paper covering security interests in land has been prepared by the Commission staff and will be considered by the Commission.

13. The Land Titles Act Project

The Commission decided during the latter part of 1981 to undertake a fundamental review of *The Land Titles Act*. Particular attention will be paid to the machinery of the land titles system, the function of the registrar, the forms prescribed by the *Act*, the effect of registration, transfers, mortgages, leases and caveats with or without supporting documents, obsolete or what may be obsolete sections as well as the relationship of other statutes with *The*

Land Titles Act such as *The Tax Enforcement Act*, *The Mineral Taxation Act* and *The Planning and Development Act*. This project is being carried on with representatives from Alberta, the Yukon, the Northwest Territories and others. Some of the fundamental principles underlining the Torrens system were discussed at a meeting held in Edmonton in December of 1981, and it is expected that there will be further meetings in this regard. In the meantime, background research will be carried on throughout 1984.

14. Review of The Coroners Act

In response to suggestions received from a number of legal practitioners in Saskatchewan, the Commission decided to undertake a review of *The Coroners Act*. Some question the usefulness of the inquest in modern society; others are concerned about specific matters such as:

- (1) jurisdiction and powers of coroners;
- (2) the coroner's absolute discretion as to who shall be called as witnesses and who shall be given standing;
- (3) the development of a type of professional jury rather than a jury picked at random;
- (4) the right to counsel at an inquest;
- (5) the right to be heard;
- (6) the coroner's power to commit for contempt;
- (7) questions of evidence such as self-incrimination and compellability;
- (8) the Crown attorney's role;
- (9) the authority of the Minister of Justice to stay or to permit an inquest to proceed in the face of criminal charges;
- (10) the effectiveness of recommendations made by a coroner's jury;
- (11) quashing an inquest.

Tentative proposals for a Coroners Act were drafted and released on a limited basis to coroners in Saskatchewan and government officials. In view of the fact that the Government proposes introducing a new Coroners Act into the Legislature early in 1984, the Commission intends to issue a final report either before or after the matter has been dealt with in the House.

15. New Home Warranties

Many Saskatchewan residents buy newly constructed houses for use as family residences. However, the sale of houses by model and the growing specialization in components such as air conditioning and heating systems, have made it much more difficult for consumers to ensure that they are obtaining a building which meets certain basic standards of durability and safety. Unlike the purchaser of consumer goods, the purchaser of a new home in Saskatchewan is forced to rely substantially on common law. It is somewhat anomalous that the purchaser of a small appliance such as a toaster obtains the full protection afforded by the warranty provisions of *The Consumer Products Warranties Act*, whereas the purchaser of a house which has a much greater value receives no similar statutory protection and very little protection under the common law. At common law, in the absence of an express statement by the builder, implied warranties as to fitness of habitation or quality of workmanship and materials only apply if the house is not yet completed. If it is completed, the doctrine of *caveat emptor*, long since abolished in the area of sale of goods, still applies.

The deficiencies in the common law were recognized in Ontario, and a *New Home Warranties Act* was passed in 1967. The Commission has been exploring the feasibility of a study which would lead to recommendations for legislation providing purchasers of new homes in Saskatchewan with an adequate measure of legal protection against construction and material deficiencies and which would bring the law applicable to the sale and purchase of new homes more in line with that applicable to the sale and purchase of consumer goods. However the project is in abeyance until the services of a consultant are obtained.

16. The Enforcement of Money Judgments

The law of Saskatchewan dealing with the enforcement of money judgments is very much in need of modernization, consolidation and rationalization. Work in this area of the law which is large and complex, will be undertaken if the services of a consultant can be obtained.

17. The Guardianship Act: Part II: Property Guardianship

The Commission engaged the services of a consultant to undertake a study of the law governing guardianship of the property of mentally incapacitated persons. Existing legislation is contained in several statutes such as *The Mentally Disordered Persons Act*, *The Administration of Estates of Mentally Disordered Persons Act*, *The Mental Health Act* and *The Trustee Act*. The study will include a detailed review of the provisions of *The Mentally Disordered Persons Act* which in some aspects are out of date. The consultant has been unable to complete his work as originally anticipated in 1983.

18. Costs of Accused on Acquittal

A considerable amount of background research has been done, and a draft paper was prepared by a consultant in 1980. It is possible that a paper may be ready for publication in 1984, depending on research resources.

19. Review of The Marriage Act

Professor Ronald Fritz, College of Law, University of Saskatchewan has been engaged to review *The Marriage Act*. It is expected that he will have a paper prepared for consideration by the Commission late in 1984.

20. Other Activities

On occasion, representatives of the Commission have met with or made presentations to public organizations, service groups and others, and have explained the role of law reform to students. When reports are released by way of tentative proposals, press releases are issued, press conferences held and appearances made on radio and television. While law reform often is a highly technical matter, law does not operate in a vacuum and every effort is made to keep the general public fully informed of the Commission's activities. The Commission and its staff is always receptive to comments from organizations and members of the public.

Members of the Bar have been invited to suggest areas in need of reform, and have brought to the attention of the Commission many difficulties encountered in everyday practice. The Commission is attempting to involve the practising Bar to a greater degree in law reform, and has undertaken to deal with several smaller practice oriented problems, in some instances engaging the same lawyers who brought the anomalies to its attention.

Final Reports to the Minister of Justice in 1983*

Proposals for a Guardianship Act, Part I: Personal Guardianship

This report deals with the selection, appointment and authority of personal guardians for persons who are unable to take care of themselves. For the parents of a mentally retarded child, what happens to that child after their deaths is an agonizing concern. The trend toward deinstitutionalization of mentally disordered persons, many of whom can re-enter the community with supervision and guidance, should be complemented by modern, practical guardianship legislation. Provision of guardianship assistance to elderly persons who have become incapacitated may become of significant importance in the future if the projected population growth of Saskatchewan citizens aged 65 and over proves accurate.

Guardianship becomes necessary only where there is a need to clearly establish legal authority and responsibility, or to interfere with *de facto* authority which has been exercised in an unacceptable manner. Some examples of situations in which appointment of a guardian probably would be indicated are as follows:

- (1) The parents of mentally retarded adults are usually concerned about the care and supervision their retarded children will receive after their own deaths. In some cases, it is possible to reach an informal understanding with the retarded child's siblings, or other concerned relative. There is, however, at present no mechanism for the parents to ensure that some person will have legal authority to take responsibility for the care and supervision of a retarded adult child after the parents' deaths. In the Commission's opinion, it would be entirely appropriate for a parent to make a testamentary appointment of a guardian.
- (2) Unless appointed as guardian, a parent has no legal authority to control the behaviour of his adult retarded child. Similarly, unless a potential ward has been committed to an institution under *The Mental Health Act*, the persons in charge of a group home or other institution have no legal authority over their charges. *De facto* authority may not be satisfactory where it is necessary to impose restrictions on a *de facto* ward against his will. For example, a mentally retarded person living at home or in a group home may require discipline, or may resist changes in his associations and lifestyle which are nevertheless in his interest. Appointment of a guardian would be appropriate in such cases.
- (3) If the care and supervision provided by the person who has *de facto* responsibility for an incapacitated person are not adequate, it may be necessary to intervene. In some cases, inadequate care may amount to an offence under section 197 of the *Criminal Code*. However, intervention would be justified even in cases in which it would not be appropriate to lay a criminal charge, and in any event, a criminal prosecution would not provide substitute care and supervision for the incapacitated person. Guardianship legislation would provide a mechanism for substituting a new guardian in such cases.
- (4) Some mentally retarded persons, or outpatients suffering from mental disorder, may be capable of living on their own with some degree of supervision. Appointment of a guardian would provide a means of providing that supervision. The guardian would be able to intervene to provide direction to the ward in necessary cases.
- (5) In many cases, institutional staff make decisions on behalf of their charges on a daily basis. Although appointment of a guardian would not always be necessary in such cases, there are situations in which establishment of formal authority would be desirable. For example, if the ward requires continuing health care, appointment of a guardian to provide consent to the health care may be desirable.

The Commission recommends enactment of a Personal Guardianship Act. Subsection (1) of section 3 of the proposed Act permits the court to appoint a guardian in circumstances where the proposed ward

lacks sufficient capacity to understand the nature and appreciate the consequences of decisions in respect to matters relating to his or her personal care and welfare, and who is in need of care or supervision.

The jurisdiction of the court under that proposal is broad enough to permit appointment of a guardian in any appropriate case. The Commission does not believe that the jurisdiction can be further limited without creating the risk that appointment of a guardian would not be possible in some appropriate cases. However, if appointments were made in all cases within that jurisdiction, many guardians would be unnecessarily appointed. The *Alberta Dependent Adults Act* has been criticized for just that reason. To avoid that result, the proposals, rather than limiting

*Copies are available from the offices of the Law Reform Commission.

the court's jurisdiction, attempt to guide the exercise of that jurisdiction by discouraging appointment of guardians in cases in which there is no practical or legal need to establish a formal guardian-ward relationship. Subsection (3) of section 3 provides that:

Nothing in this Act shall require the court to appoint a personal guardian for a person where such an appointment is not necessary to ensure adequate care and supervision of the proposed ward, or for any legal purpose.

To the extent that persons are capable of taking care of themselves, they must be accorded that opportunity; to the extent that they are reliant on others for decisions respecting their self-care, they must have the opportunity to have a personal guardian appointed to make those decisions.

Much will depend on the person who is appointed personal guardian. No person should be appointed unless the court is satisfied that the proposed guardian appears to be suitable and is likely to provide the protection which the ward requires. As well, the courts should consider the wishes of the person for whom a personal guardian is sought to the extent that the court considers appropriate, having regard to that person's capacity.

As to a public guardian and "ombudsman", it is recommended that the Minister of Social Services be appointed personal guardian where a person is in need of a personal guardian and there is no one suitable or willing to be appointed as such. The "ombudsman" role should be filled by an independent officer of the Legislature whom we refer to as the "Official Representative". This arrangement will meet the argument that a supplier of social services should not be appointed guardian, with the inevitable conflict of interest which may arise. The Department will also be responsible under the *Act* for investigating whether an individual is in need of a guardian.

The Official Representative is required because wards and prospective wards cannot usually speak for themselves. The Official Representative will be responsible for protecting the interests of proposed wards and wards in guardianship but would not act as guardian of the person in any case. Some of the situations in which the Official Representative might take action under the proposed legislation include:

1. Where an application is made for an order appointing a personal guardian,
 - (a) If the Official Representative is of the opinion that the person in respect of whom the application is made is not in need of a personal guardian, then the Official Representative will oppose the application;
 - (b) if the Official Representative is of the opinion that the person proposed as personal guardian is not suitable, again the proper course will be to oppose the application;
 - (c) if the applicant is seeking greater personal guardianship authority than the Official Representative considers necessary, such opinion will be brought to the court's attention.
2. Once an order appointing a personal guardian is made, if the Official Representative is of the opinion that the order is not being carried out in accordance with its terms and the terms of the Act, an application for review of the order will be made.
3. Where the Official Representative finds that a person is in need of a personal guardian and there is no one willing to assume that role, the proper course will be to launch an application to have the Minister named as personal guardian. The monitoring role of the Official Representative will be no different in the case where the Minister is appointed personal guardian than it will be in the case of a private individual appointed as such.

Proposals Relating to Guest Passenger Legislation

The owners and drivers of motor vehicles are ordinarily liable for injury caused by their negligence in highway traffic accidents. In 1936, however, the Saskatchewan *Vehicles Act* was amended to limit the right of gratuitous passengers to recover damages from the owners and drivers of vehicles in which they were carried. A similar provision is still contained in the *Act*,* which now provides that:

- 178(2) The owner or driver of a motor vehicle, other than a vehicle used for carrying passengers for hire or gain, is not liable for loss or damage resulting from bodily injury to or the death of a person being carried in or upon or entering, or getting onto, or alighting from the motor vehicle, unless there has been wilful and wanton misconduct on the part of the driver of the vehicle and unless the wilful and wanton misconduct contributed to the injury.

*References to the Act herein and in the report are to R.S.S. 1978, c. V-3.

The major beneficiary of guest passenger legislation has been the insurance industry. Since the legislation was enacted without much public debate, it would appear that no real effort was made to reconcile the legislation with public policy regarding automobile accident insurance. Nevertheless, several justifications for guest passenger legislation have been advanced from time to time since the legislation was adopted.

The justification for guest passenger legislation most often advanced by the insurance industry has been prevention of collusion. It is argued that in the absence of legislation, an insured driver will admit to negligence simply to permit an injured passenger to claim insurance money. This may be particularly so where the driver or owner is a friend or relative of the insured passenger. Numerous criticisms have been leveled against the present legislated response to that perceived mischief.

Since repeal of guest passenger legislation in several Canadian jurisdictions, the insurance industry itself has come to realize that the danger of collusion in guest passenger claims is not as great as it once was perceived to be. In May, 1982, the Commission made inquiries of the ten largest motor vehicle insurance companies in Canada carrying on business in provinces in which guest passenger legislation had been repealed as to whether

your experiences have coincided with the traditional industry argument that such changes [repeal of guest passenger legislation] would give rise to an unacceptable level of fraudulent and collusive claims.

Of the seven responses, one official ventured no opinion, and the other six concluded that the industry fear of collusion had been unfounded. Two of the respondents indicated, however, that while no-fault benefits under their company policies had satisfied most injured passengers, incidents of fraud were believed to have occurred. But the problem was not perceived to be serious, since one of those respondents wrote that:

The much talked of encouragement to collusion, we find has not materialized . . . These changes . . . have imposed no significant hardship on us.

and the other wrote

In all candor one sees very few abuses of a fraudulent or collusive nature wrought by elimination of this exclusion.

Even if there was a serious danger of collusion, it would be unfair to deny meritorious claims for that reason alone. It is the function of our courts to weight and assess evidence. The laws of evidence and rules of procedure have been designed to facilitate discovery of the truth in contested cases. Guest passenger legislation, to the extent that it is designed merely to prevent collusion, usurps that function of the courts.

Guest passenger legislation has also been justified because it presumably reduces the number of claims which must be paid by insurance companies, a saving which may be passed on to the public through lower premiums. No doubt any limitation of liability will be reflected in the cost of liability insurance. However, the effect will be small. Insurance companies were also asked whether they were able to provide either

statistics or . . . general impressions as to what the cost implications have been for your company in those provinces that have made the changes [abolishing guest passenger legislation].

None of the insurers who responded had found it necessary to collect such data for their operations. For the most part, the financial impact of the changes was considered to be "relatively small" or not "significant". One insurer estimated that in establishing the premium rates, the changes would have an "impact on third party premiums . . . in [the] range of 1-2 percent". Of some significance, officials from five of the insurance companies felt the changes had little impact since the courts had not been drawing meaningful distinctions between ordinary negligence and gross negligence in any event.

The traditional justifications for guest passenger legislation are no longer convincing. But even if they carried more credibility, guest passenger legislation would still be difficult to reconcile with the contemporary policy of tort and insurance law. It does not even accord with traditional tort law applicable to persons who are injured in analogous situations. At common law, a person may be held liable for negligence even for gratuitous acts of assistance once that act has been undertaken.

Perhaps more importantly, road accidents are now regarded as a social problem which must be addressed by public policy. It is no longer sufficient to regard liability insurance as simply a prudent precaution which the owner or driver of a vehicle may elect to take. Rather, liability insurance has become an essential part of a mechanism for compensating accident victims and distributing the losses resulting from traffic accidents. Mandatory liability insur-

ance requirements are a cornerstone of that policy. Exclusion of guest passengers from the protection otherwise provided to persons who risk injury in motor vehicle accidents can simply not be reconciled with the contemporary philosophy of automobile insurance.

The Commission has concluded that the liability of owners and drivers to guest passengers should be no different than the liability for injury to any other person. This will require repeal of section 178(2) of *The Vehicles Act* which contains the present limitation on liability to guest passengers. Ordinarily, repeal of a statutory provision will revive the common law. This report has noted that the common law relating to liability for injury to guest passengers was not clear in Canada prior to the adoption of guest passenger statutes. However, the basis for negligence claims against the owner or driver of a vehicle in Saskatchewan now has a statutory foundation. Section 178(1) of *The Vehicles Act* provides that:

Subject to subsection (2), when any loss, damage or injury is caused to a person by a motor vehicle, the person driving it at the time is liable for the loss, damage or injury, if it was caused by his negligence or improper conduct, and the owner thereof is also liable to the same extent as the driver unless at the time of the incident causing the loss, damage or injury the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of the person entrusted by him with the care thereof.

Repeal of section 178(2) will have the effect of making the driver or owner of a vehicle liable for injuries to a gratuitous passenger caused by "negligence or improper conduct". Section 178(1) should be amended, however, to delete the reference to subsection (2).

Plans for the Year 1984

1. Family Law Project

Tentative Proposals arising out of the review of *The Matrimonial Property Act* will be released in 1984.

2. Consumer Credit Project

Work will continue on this project particularly in the areas of the cost of credit disclosure, credit insurance, consumer education and credit grantors' liability for merchants' default in performance.

3. Provincial Offences Project

A Final Report entitled "Proposals for Defences to Provincial Offences" will be released after the Commission has had an opportunity of considering proposals in the area now being formulated by the Alberta Institute of Law Research and Reform.

4. Medical-Legal Project

The Final Report entitled "Proposals for a Compulsory Mental Health Care Act" will probably be released in 1984.

It is possible that a final report containing "Proposals for a Lieutenant Governor's Review Board in Saskatchewan" will be made to the Minister of Justice in late 1984.

5. Administrative Law Project

This project is in abeyance until another consultant has been retained.

6. English Statutes Project

Work will continue on a paper, dealing with old English statutes in force in the province, which may be available in 1984 for study and comments by members of the legal profession.

7. The Limitation of Actions Act Project

This project is in abeyance at the present time.

8. Frustrated Contracts Project

It is expected that a paper will be released during 1984.

9. Sale of Goods Project

The Uniform Law Conference *Uniform Sale of Goods Act* will be studied to determine its appropriateness for enactment in Saskatchewan.

10. Products Liability Project

It is expected that further work will be undertaken in this project during 1984.

11. Real Property Law Project

Consideration is being given to a paper dealing with security interests.

12. The Land Titles Act Project

Background research will continue on this project throughout 1984.

13. Review of The Coroners Act

The Final Report will be released in 1984.

14. New Home Warranties

This project is in abeyance at the present time.

15. The Enforcement of Money Judgments

This project is in abeyance at the present time.

16. Property Guardianship

Work will continue on property guardianship.

17. Costs of Accused on Acquittal

The Commission staff is working on a paper outlining the policy issues in this area.

18. Review of The Marriage Act

Review of *The Marriage Act* will be undertaken in 1984.

19. Other Activities

The Commission has undertaken a number of smaller practice-oriented projects, and it is expected that recommendations will be made to the Minister of Justice dealing with *The Automobile Accident Insurance Act* (sections 78 & 79), *The Tax Enforcement Act* (section 31), the ademption rule, post-judgment interest as well as other matters.

PERSONNEL

The Commission

The Law Reform Commission Act provides that the Commission shall be composed of not less than three members appointed by the Lieutenant Governor in Council and that one of the members shall be designated as chairman. Dr. Douglas A. Schmeiser, Q.C., of the College of Law, University of Saskatchewan, is the Chairman and Miss Marjorie A. Gerwing, Q.C. and Mr. Gordon J. Kuski, Q.C. are the other Commissioners.

Previous members of the Law Reform Commission were Professor Brian A. Grosman (Chairman, 1974 to 1978), Professor Ronald C. C. Cuming (Chairman, 1978 to 1982), Mr. Justice E. D. Bayda (1974 to 1976), and Mr. George J. D. Taylor, Q.C. (1974 to 1982). Miss Gerwing was appointed to the Commission in 1976, and Professor Schmeiser and Mr. Kuski were appointed in 1982.

The Staff

Mr. Kenneth P. R. Hodges is the Director of Research having joined the Commission in October of 1976. The Legal Research Officers are Mr. Michael J. Finley, who joined the Commission in March of 1977, and Mr. C. Peter Thagard, who joined the Commission in April of 1983.

In addition, the Commission employs two Legal Research Officers under contract who are funded by the Law Foundation of Saskatchewan. These Legal Research Officers are Mr. Rod Wood who joined the Commission in June of 1983 and Mrs. Sandy Antonini-Ready who joined the Commission in September of 1983.

The Commission was fortunate in being able to have the assistance of three students at law, Katherine J. Young, Daniel Le Dressay and Curtis W. Talbot during the summer of 1983.

The Commission also retains the services of a number of people as part-time consultants. The Commission is pleased to be able to rely on these outside consultants and is obliged to them for their ongoing efforts which have helped to maintain a healthy level of law reform activity within the province.

LAW FOUNDATION

The Law Foundation of Saskatchewan which was providing funds for specific programs of law reform at the request of the Commission, is now supporting some of the Commission's work by "block funding". Under this arrangement the Commission has been able to engage the services of two full-time Legal Research Officers under contract. Some of the projects which have been or are being supported financially by the Foundation are: The Matrimonial Property Act Review and the relationship of that Act with *The Homesteads Act*, *The Intestate Succession Act* and *The Dependents' Relief Act*; Committal under a Lieutenant Governor's Warrant; Consumer Credit; Occupiers' Liability; Frustrated Contracts; Guest Passenger Legislation and The Coroners Act Review.

The Commission wishes to take this opportunity to express its appreciation to the Law Foundation of Saskatchewan for its most important financial assistance.

OTHER LAW REFORM ORGANIZATIONS

The Commission has, during the course of the year, continued to develop good liaison with other law reform agencies both in and outside Canada. This exchange of information is essential to the functioning of the Law Reform Commission of Saskatchewan. Such close liaison minimizes the replication of research and makes available to this Commission research papers, reports and proposals which can be adapted to the Saskatchewan legal environment without incurring the financial burden necessitated by initiating original legal research in each area undertaken. The Saskatchewan Commission has gained substantially from the research completed by other commissions in areas of mutual interest.

In order to maintain important contacts in areas of interest to the Commission and its research commitments, the Chairman, the Director of Research and other members of the staff attended various meetings and conferences during the year. The Chairman and the Director of Research are delegates to the Uniform Law Conference of Canada and attended the Annual Conference in Quebec City in August of 1983.

PUBLICATIONS

1. First Mini-Working Paper, Division of Matrimonial Property, "Problems Within the Present Law", June 1974.
2. Second Mini-Working Paper, Division of Matrimonial Property, "Possible Solutions to Problems Within the Present Law", September 1974.
3. Third Working Paper, Division of Matrimonial Property, "Tentative Proposals for Reform of Matrimonial Property Law", October 1974.
- *4. First Annual Report 1974.
5. Background Paper, "Reform of Personal Property Security Law in Saskatchewan", May 1975.
6. Background Paper, "Family Maintenance Between Husband and Wife", November 1975.
7. Background Paper, "Children's Maintenance", January 1976.
- *8. Second Annual Report 1975.
- *9. "Tentative Proposals for a Saskatchewan Personal Property Security Act", February 1976.
10. Report to the Attorney General, "Proposals for a Saskatchewan Matrimonial Homes Act", May 1976.
11. Report to the Attorney General, "Conflict of Interest", March 1977.
- *12. Third Annual Report 1976.
13. Working Paper, "Provincial Offences: Tentative Recommendations for Reform", April 1977.
14. Report to the Attorney General, "Proposals for a Saskatchewan Personal Property Security Act", July 1977.
15. Fourth Annual Report 1977.
16. "Tentative Proposals for a Consent of Minors to Health Care Act", November 1978.
17. Fifth Annual Report 1978.
18. Tentative Proposals for Reform of the Law Affecting Liability Between Husband and Wife and Related Insurance Contracts, March 1979.
19. Tentative Proposals for Reform of the Jury Act, May 1979.
20. Tentative Proposals for Custody Law Reform, Part I: Substantive Law, August 1979.
21. Proposals for Reform of the Law Affecting Liability Between Husband and Wife and Related Insurance Contracts, November 1979.
22. Proposals for Reform of the Jury Act, December 1979.
23. Tentative Proposals Relating to the Civil Rights of Children, December 1979.
24. Proposals for a Consent of Minors to Health Care Act, February 1980.
25. Sixth Annual Report 1979, March 1980.
26. Tentative Proposals for Custody Law Reform, Part II: Procedures and Support Services, May 1980.
27. Tentative Proposals for a Definition of Death Act, June 1980.
28. Tentative Proposals for an Occupiers' Liability Act, June 1980.
29. Tentative Proposals for a Consumer Credit Act, Part I: Background and Underlying Considerations, Part II: Statistics, August, 1980.
30. Proposals for an Occupiers' Liability Act, October 1980.
31. Proposals for a Definition of Death Act, December 1980.
32. Tentative Proposals for a Guardianship Act, January 1981.

33. Tentative Proposals for Defences to Provincial Offences, February 1981.
34. Yearly Review 1980, April 1981.
35. Tentative Proposals for a Consumer Credit Act, Part III: Secured Consumer Credit Transactions, Summary of Recommendations, May 1981.
36. Tentative Proposals for an Equality of Status of Married Persons Act, May 1981.
37. Tentative Proposals for Changes in Limitations Legislation, Part I: The Effect of Limitations on Title to Real Property, July 1981.
38. Tentative Proposals for a Human Artificial Insemination Act, November 1981.
39. Proposals on Custody, Parental Guardianship, and the Civil Rights of Minors, December 1981.
40. Tentative Proposals for a Compulsory Mental Health Care Act, November 1981.
41. Tentative Proposals for an Enforcement of Maintenance Orders Act, March 1982.
42. Yearly Review 1981, April 1982.
43. Proposals for an Equality of Status of Married Persons Act, May 1982.
44. Proposals for a Guardianship Act, Part I: Personal Guardianship, January 1983.
45. Yearly Review 1982, March 1983.
46. Proposals Relating to Guest Passenger Legislation, August 1983.
47. Tentative Proposals for a Lieutenant Governor's Review Board in Saskatchewan, January 1984.

*Out of Print.

An Act to establish a Law Reform Commission.*

- Short title** 1 This Act may be cited as *The Law Reform Commission Act*.
- Commission continued** 2 The Law Reform Commission of Saskatchewan, herein referred to as the "commission", is continued. 1971, c. 21, s. 2.
- Membership** 3(1) The commission shall be composed of not less than three members appointed by the Lieutenant Governor in Council and shall hold office during the pleasure of the Lieutenant Governor in Council.
- (2) The Lieutenant Governor in Council shall designate one of the members as chairman.
- (3) The chairman shall be the chief executive officer of the commission and shall preside at all meetings and hearings of the commission.
- (4) In the absence or disability of the chairman or if the office of chairman is for any reason vacant another member of the commission, appointed by the members, shall act as chairman. 1971, c. 21, s. 3; 1973, c. 54, s. 1.
- Remuneration** 4 The members of the commission shall be paid such remuneration for their services and such allowances for travelling and other expenses as the Lieutenant Governor in Council may determine. 1971, c. 21, s. 4.
- Staff** 5 The Lieutenant Governor in Council may appoint such officers and employees of the commission as are required for the proper conduct of the business of the commission and for the purposes of this Act. 1971, c. 21, s. 5.
- Duties of commission** 6 The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law, and for that purpose shall:
- (a) receive and consider any proposals for the reform of the law that may be made to it by the Minister of Justice;
 - (b) prepare and submit to the Minister of Justice from time to time programs for the examination of different branches of the law with a view to their reform and shall recommend that an agency, whether the commission or a committee thereof or other body, carry out the examination;
 - (c) undertake, at the request of the Minister of Justice or pursuant to recommendations of the commission approved by the Minister of Justice, the examination of particular branches of the law and the formulation, by means of draft bills or otherwise, of proposals for reform therein;
 - (d) enter into agreements, with the approval of the Minister of Justice, with other organizations for law reform for the purposes of attaining the aims of the commission. 1971, c. 21, s. 6.

* R.S.S. 1978, c. L-6 as amended.

7 The commission may institute and direct legal research for the purpose of carrying out its functions. 1971, c. 21, s. 7. Legal research by commission

8(1) The commission may appoint committees, the members of which need not be members of the commission, and may refer any matter to the committees for consideration and report to the commission. Committees of commission

(2) Members of committees appointed under subsection (1) shall receive such remuneration for their services and such allowances for travelling and other expenses as the Lieutenant Governor in Council may determine. 1971, c. 21, s. 8.

9 The commission may report from time to time to the Minister of Justice and shall report to the Minister of Justice at any time upon his request, but shall report at least once yearly if no request is made. 1971, c. 21, s. 9. Report by commission

10 The Minister of Justice may authorize the commission to publish any report submitted to him. 1971, c. 21, s. 10. Publication of report by commission

11 The Minister of Justice shall make and submit to the Lieutenant Governor in Council an annual report respecting any programs prepared by the commission and approved by him and any proposals for reform formulated by the commission pursuant to such programs, which report shall, in accordance with *The Tabling of Documents Act*, be laid before the Legislative Assembly. 1971, c. 21, s. 11. Annual report by Minister of Justice

12 Sums required for the purposes of this Act may be paid out of moneys appropriated by the Legislature for the purpose. 1971, c. 21, s. 12. Appropriation